Public Prosecutor v Syed Feisal bin Yahya

HIGH COURT (SINGAPORE) — MAGISTRATE'S APPEAL NO 90 OF 1989
CHAO HICK TIN JC
20 NOVEMBER 1989

Criminal Law — Dangerous drugs — Trafficking — Transportation — Intention of transporter — Misuse of Drugs Act (Cap 185, 1985 Ed), ss 5 & 8

The respondent was arrested by a party of narcotics officers on 26 August 1987. Upon being arrested the respondent led the officers to an apartment in Corona Ville where 22.33 kg of cannabis was recovered. The accused later made a statement admitting collecting gunny sacks of cannabis from Tuas and transporting them to Corona Ville. He was charged with trafficking under s 5 of the Misuse of Drugs Act (Cap 185, 1985 Ed) ('the Act'). The district judge hearing the case felt that he could not convict the respondent as it had not been proved that the respondent intended to part with possession of the drugs to someone else, and amended the charge to one of possession and convicted the respondent. The public prosecutor appealed.

Held, allowing the appeal:

(1) When dealing with the transportation of a controlled drug from one place to another for the purpose of passing them to another, it is immaterial whether the purpose is achieved or not. It is sufficient so long as the transportation was carried out with a view to parting with the possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. The crucial element is the intention of the transporter at the time of transportation.

(2) The quantity which the respondent transported was very much larger than was likely to be needed for his consumption and the inference was irresistible that he was transporting the cannabis for the purpose of trafficking in them. There was transportation and there was the intention to sell.

(3) There was no reason why a person may not be charged with trafficking, even though he was not intercepted in the course of transporting but after the drugs had been moved to another place to facilitate sale or distribution.

Cases referred to

1 *Ong Ah Chuan* v *PP* [1981] 1 MLJ 64 (refd)
2 *PP* v *Lau Chi Sing* [1988] 1 MLJ 383; [1989] 1 MLJ 5 (CCA) (refd)

Legislation referred to

Misuse of Drugs Act (Cap 185, 1985 Ed) ss 5, 8

Sowaran Singh for the Public Prosecutor.
Syed Hassan Almenoar for the respondent.

Cur Adv Vult

Chao Hick Tin JC: The two respondents were charged and tried before the district court on the following charge:

> You B(1) Syed Feisal bin Yahya, Male/31 years
> IC: 7217528 (Malaysian)
> B(2) Saripah Noraini bte Mohd, Female/20 years
> IC: S1808415-E (Singaporean)
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> are charged that you, on or about 24 August 1987 at about 5pm onwards in Singapore, in furtherance of the common intention of you both, did traffic in a controlled drug specified in Class 'B' of the First Schedule to the Misuse of Drugs Act (Cap 185, 1985 Ed), to wit, by transporting 22.33 kg (nett) of cannabis in motorcar, WX 7690, from Tuas to Apartment #01-41, Corona Ville, off 35 Jalan Haji Alias, without authorization under the said Act or the Regulations made thereunder and you have thereby committed an offence under section 5(a) of the Misuse of Drugs Act (Cap 185, 1985 Ed) and punishable under section 33 of the Misuse of Drugs Act (Cap 185, 1985 Ed) and read with section 34 of the Penal Code (Cap 224, 1985 Ed).

At the conclusion of the trial, the learned district judge found that on the evidence the respondents could not be guilty of the charge of trafficking under s 5(a) of the Misuse of Drugs Act. He amended the charge to one of possession under s 8(a) of the Act and convicted them on the lesser charge and sentenced them to imprisonment terms of four years and two years respectively.

The public prosecutor, being dissatisfied, appealed against the decision of the district judge in amending the charge and convicting the respondents on the lesser charge. The public prosecutor also appealed against the sentences imposed on the respondents under the amended charge. No appeal was filed by the respondents. The second respondent was the girl-friend of the first respondent.

When the appeal came up for hearing before me, the second respondent was uncertain whether she had instructed counsel to argue against the appeal on her behalf and as the counsel who appeared for her at the court below was not present in court, the deputy public prosecutor requested and the court agreed, to stand down the appeal in so far as the second respondent was concerned. This court, therefore, proceeded to hear the appeal only as against the first respondent.

The facts as found by the district judge are these. At about 12 noon on 26 August 1987, a party of narcotics officers kept surveillance in the vicinity of Corona Ville along Jalan Haji Alias. At about 1pm, the first respondent and another, one Rosman, were seen leaving Corona Ville in motor car WX 7690 driven by the first respondent. The narcotics officers trailed them until the junction of Sixth Avenue and Bukit Timah Road where both vehicles stopped because of the red traffic lights. The narcotics officers moved in and arrested both the first respondent and Rosman. Nothing incriminating was found in the car WX 7690. Both of them were then taken back to apartment #01-04 at Corona Ville, where a search was carried out. The apartment was rented in the name of one Rohani bte Sani, a girl-friend of Rosman. The master bedroom was occupied by the two respondents. In one of the cupboards in the master bedroom, the narcotics officers recovered 14 packages, which were subsequently ascertained to contain 22.33 kg of cannabis. Both the respondents were among those who were arrested.

Subsequently, the first respondent made two statements, the first under s 122(6) of the CPC and the second under s 122(5). The second respondent also made a statement under s 122(6). Both challenged the admissibility of these statements in court. Following separate trials-within-a-trial, the district judge found that the respondents had voluntarily made those statements and admitted them. In his first statement, the first respondent said:

> The rest of the accused persons did not know that the cannabis were meant for selling. Sharifah Noraini only followed me two days ago to collect the cannabis at Tuas.

In his second statement, to adopt the words of the district judge, the first respondent 'recounted how he and the second accused had gone to Tuas on 24 August 1987 in his car WX 7690. About 5pm, they collected 2 1/2 gunny sacks of cannabis from some Thais who came in a motorized sampan. He transported the cannabis in his car to Corona Ville, #01-04. There he deposited the cannabis in a cupboard in the room occupied by them and threw the gunny sacks away.'

Rosman also gave evidence regarding a conversation he had with the first respondent who told Rosman about the trip to Tuas and the cannabis kept at Corona Ville. For reasons which the district judge gave, he did not consider it prudent to place any reliance on Rosman's evidence.

In his defence, the first respondent denied that he ever made the trip to Tuas on 24 August 1987. This was contradicted by the evidence of the second respondent who said that on that day the first respondent did bring her to Tuas. For a period of about four hours they were allegedly looking at the scenery.

After considering all the evidence the district judge said, in his grounds of decision, that 'both accused had transported the said cannabis from Tuas to their Corona Ville apartment on 24 August 1987 at about 5pm. For the purpose of this appeal it would suffice to state that I rejected the defence of both accused that they never transported the said cannabis on 24 August 1987 and that they did not know the cannabis were in their bedroom cupboard.' The district judge also found that 'it was clear that both accused intended to sell the cannabis as was done by the first (respondent) on the night of 24 August 1987' where the first respondent sold 700 sticks of cannabis to one Ghani at Upper Boon Keng Road. I would pause here to observe that no submission was made by counsel for the first respondent that these findings of the district judge were wrong. In any case, in my view, these findings are amply supported by the evidence.

Notwithstanding these findings, the district judge felt that he could not convict the respondents on the original charge because it had not been proved that the respondents intended to part with the possession of the drug to someone else at the intended destination, ie Corona Ville apartment. After referring to *Ong Ah Chuan* v *PP*[1] and *PP* v *Lau Chi Sing*,[2] the district judge said:

> In all the cases cited, the accused persons were arrested in the midst of transporting. The requirement was for the prosecution to prove the accused persons intended to part with possession of the drugs to someone at the intended destination. In the instant case, this was clearly not so. The facts clearly showed both accused transported the cannabis to themselves. They moved the drugs to themselves. There was absolutely no evidence that they intended to part with possession to anyone at the Corona Ville apartment. In my view both accused were merely moving possession of the cannabis from one place to another — still retaining possession.

In coming to this conclusion the district judge had relied on the following passages, first of Lord Diplock in *Ong Ah Chuan*[1] at p 69:

> (1) The mere act of moving them does not itself amount to trafficking within the meaning of the definition in s 2; but if the purpose for which they were being moved was to transfer possession from the mover to *some other person at their intended destination* the mover is guilty of the offence of trafficking under s 3 whether that purpose was achieved or not. This is the effect of the provisions of s 3(c) and s 10.
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> (2) If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in s 15 (now s 17), that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption.

and second of Lai Kew Chai and Thean JJ in *Lau Chi Sing*[2] at p 387:

> As decided there [referring to *Ong Ah Chuan*], the test for determining whether an act of transporting drugs from one point to another falls within the meaning of 'transport' in s 2 is the purpose for which the drugs were being transported. If the drugs are transported for the purpose of distributing or giving them to one or more persons, known or in contemplation, at the *intended destination* then that act of transporting falls within the statutory meaning and is an act of trafficking; if, on the other hand, the purpose is for the transporter's own consumption, such act of transporting is not trafficking within the meaning of s 2.

The district judge placed special emphasis on the words in the passages above which are underlined.

In *Ong Ah Chuan*[1] the brief facts were that Ong was observed by two narcotics officers to have left his flat carrying a plastic bag which he put into his car. He drove some 20 miles to a spot in Bukit Timah where he stopped the car, alighted and locked the car behind him. He was arrested by the narcotics officers who had followed him all the way. A search of the car was carried out. The plastic bag which he was earlier seen to have put into his car was ascertained to contain 206g of diamorphine. On his body was also found a plastic packet which was ascertained to contain 3.84g of diamorphine. Ong sought to explain that

he was carrying the drug for his own consumption. This was disbelieved by the trial judges.

The word 'traffic' is defined in s 2 of the Act to mean, inter alia, 'sell, give, administer, transport, send, deliver or distribute'. Lord Diplock in *Ong Ah Chuan*,[1] after discussing that the verb 'transport' could have a wider or narrower meaning, depending upon the context, said that (at p 69):

> the immediate context of the verb 'transport' to which attention has been drawn, attracts the maxim noscitur a sociis. This, and the fact that it appears in the definition of the verb to 'traffic' of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combined to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another *but in the sense of doing so to promote the distribution of the drugs to another.* (Emphasis added.)

The Privy Council took pains to differentiate between transporting a quantity of controlled drugs from one place to another for one's own consumption and transporting them for the purpose of passing them to another. In the latter case it is immaterial whether the purpose is achieved or not so long as the transportation is carried out with a view to parting with the 'possession of the drug or any portion of it to some other person whether already known to him *or a potential purchaser whom he hopes to find.*' Therefore, the crucial element is the intention of the transporter at the time of transporting.

The passage in *Ong Ah Chuan*[1] upon which the district judge relied must be viewed in its proper context. The Privy Council said that the mere moving of a quantity of drugs does not amount to trafficking; but if the movement was for the purpose of transferring 'possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under s 3 [now s 5] *whether that purpose was achieved or not.*' In my judgment, the last few words 'whether that purpose was achieved or not' must not be overlooked. Indeed there is nothing in the judgment to indicate that the Privy Council was suggesting that there must be somone at the intended destination to receive the drugs as soon as the drugs arrived. There was no such evidence in *Ong Ah Chuan*[1] or in *Lau Chi Sing*.[2] I do not think the Privy Council intended that at all. On the contrary, the reference to parting possession of the drugs or any portion of them to 'a potential purchaser whom he hopes to find' in an earlier part of the judgment clearly suggests otherwise. In this kind of illicit trade, transfers will always be effected in the most stealthily ways to avoid detection. I would stress again that the distinction which the Privy Council was seeking to draw was between movement for one's own consumption and movement for sale and between a dealer and an addict. If the drugs were meant for sale, obviously the sale must be to someone else. You cannot sell to yourself. This explains the reference to 'some other person' in the judgment of the Privy Council. It is very important to bear in mind that we are here concerned with the state of mind of the transporter at the time he was transporting the drugs. What would happen or actually happened at the end of the journey is quite immaterial.

I will now turn to consider *Lau Chi Sing*.[2] In that case it was proved that the accused transported 242.85g of diamorphine from Ghim Peng Hotel, Geylang Road to the Singapore Changi Airport. Having checked in at the airport counter and obtained a boarding pass for a flight to Amsterdam, he was arrested by narcotics officers as he was about to leave the counter. From eight Hi-Watt batteries he was carrying, 242.85g of diamorphine was found therein. The charge against Lau Chi Sing was that he had trafficked in a controlled drug by transporting the drugs from Ghim Peng Hotel to Singapore Changi Airport in a taxi. The arguments raised by Lau Chi Sing were summarized by the trial judges as follows at p 386:

> The act of transporting in that sense [the narrower sense declared in *Ong Ah Chuan*] necessarily involved two or more persons. In the instant case, the accused did not transport the drugs in that sense from Ghim Peng Hotel to Changi Airport for the purpose of distribution or giving them to anyone there; he was merely moving the drugs and bringing them out of the country. He did not attempt to distribute or give the drugs to anyone at Changi Airport and there was no intention of his so doing ... His destination was abroad and the distribution was intended to take place abroad ... To fall within the meaning of the word 'transport' in s 2, the intended destination where the distribution of the drugs is to take place or contemplated must be in Singapore ....

I would, at this juncture, observe that there is a slight similarity between the point raised in the first part of this argument and the point that arose in our present case. There, the trial judges, while recognizing that the point that arose was not explicitly covered by the judgment in *Ong Ah Chuan*,[1] said at p 387:

> ... it seems to us that it is implicit in that judgment [*Ong Ah Chuan*] that such an act of transportation falls within the meaning of 'transport' in s 2. As decided there, the test for determining whether an act of transporting drugs from one point to another falls within the meaning of 'transport' in s 2 is the purpose for which the drugs are being transported. If the drugs are transported for the purpose of distributing or giving them to one or more persons, known or in contemplation, at the intended destination then that act of transporting falls within the statutory meaning and is an act of trafficking; if, on the other hand, the purpose is for the transporter's own consumption, such act of transporting is not trafficking within the meaning of s 2. Hence, it seems to us that so long as the drugs are transported for the purpose of distribution, it is immaterial whether the intended distribution takes place here or abroad. We are not, in this case, concerned with the act of distribution but with the act of transporting for the purpose of distribution. The gravamen of the charge in this case is not the act of distributing the drugs but the act of transporting them for the purpose of distribution. Adopting

> the words of Lord Diplock, if the purpose for which the drugs are being moved is to transfer possession from the mover to some other person known or in contemplation at the intended destination the mover is guilty of the offence of trafficking in drugs, irrespective of whether the purpose is achieved or not and — we would add — irrespective of whether the intended destination is here or abroad. Logically, it must follow that such a mover commits the offence immediately after he has begun his journey of moving the drugs, irrespective whether he reaches his destination or not.

The second half of this passage of the trial judges was cited with approval by the Court of Criminal Appeal. The first half of this passage was the part relied upon by the district judge. In answer to the point that no offence was committed as the transfer of the drugs was to take place abroad and the Act has no extra-territorial effect, the appellate court said that 'the offence is completed once there is the act of transportation so long as the purpose of the transportation is to transfer possession to some other person in contradistinction to an intention to keep the drugs solely for one's own consumption. As stated, whether the transporter of the drugs achieves that purpose is irrelevant to his guilt of the offence of trafficking.' Lau Chi Sing's petition to the Privy Council for special leave to appeal was dismissed. That part of the passage of the trial judges upon which the district judge relied must be viewed in the context. I do not think it goes quite so far as the district judge seems to have thought.

The fact situation in the present case is of course not the same as in *Ong Ah Chuan*[1] or *Lau Chi Sing*.[2] But I think applying the broad principles enunciated in those two cases, what was done here by the first respondent clearly amounted to trafficking. It is not disputed that on 24 August 1987 at 5pm, the first respondent transported the cannabis in question from the beach at Tuas to Corona Ville for the purpose of selling them or promoting their distribution. The quantity which the first respondent transported was very much larger than was likely to be needed for his and/or the second respondent's consumption and the inference is irresistible that he was transporting the cannabis for the purpose of trafficking in them. But that is not all. Not only had the first respondent not offered any explanation for the transportation of that large quantity of cannabis, and not only did he not say that the entire lot of cannabis was for his and/or the second respondent's own consumption, he had in his own statement very clearly admitted that he was a drug dealer and the cannabis was for sale. The district judge has also found that the drugs were for sale. Even without resorting to the presumption contained in s 17 of the Act, there is ample evidence that the transportation of the cannabis by the first respondent on 24 August 1987 was done with the aim of selling them or promoting their distribution.

In my opinion, on these facts, all the ingredients necessary to constitute the offence of trafficking under s 5 of the Act have been proven. There was transportation and there was the intention to sell. Granted that a person who is charged with trafficking is more likely to be one who is caught in the course of transporting. But there is no reason why a person may not be charged with trafficking if there is evidence of such transportation even though he was not intercepted in the course of transporting but after the drugs have been moved to another place to facilitate sale or distribution. To hold otherwise would mean that if the first respondent were intercepted anywhere on the journey before he reached Corona Ville, an offence of trafficking would be established; but it would not be established if the first respondent should manage to successfully transport the cannabis to Corona Ville and store it at the apartment. I do not find any merit in this distinction. In my view, and with respect, where the district judge has gone wrong was to approach the question by looking what happened to the cannabis at the end of the transportation. He seemed to think that on the authority of *Ong Ah Chuan*[1] unless the packages of cannabis were transferred immediately on arrival at Corona Ville or very soon thereafter to someone else, the offence of trafficking was not proven. *Ong Ah Chuan*[1] did not decide anything quite like that at all. It did not arise there. The correct question to ask is what was the first respondent's purpose when he began to transport the cannabis from Tuas to Corona Ville. The answer to this question is clear beyond any doubt from the statements of the first respondent.

In the result I set aside the conviction recorded and sentence imposed by the district court on the amended charge and convict the first respondent on the original charge. I accordingly sentenced the first respondent to the minimum sentence of 20 years' imprisonment and 15 strokes of the cane.

Appeal allowed.

Solicitors: *Tan Rajah & Cheah.*

Reported by *Mathavan Devadas*